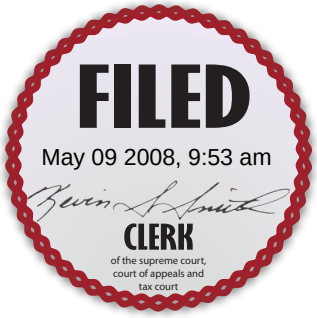

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IN THE
COURT OF APPEALS OF INDIANA

DAVID OHM,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0604-CR-336
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Ronald E. Melichar, Judge
Cause No. 79C01-8904-CF-5

May 9, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, David Ohm (Ohm), appeals his sentence for two counts of murder, a felony, Ind. Code § 35-42-1-1.

We affirm.

ISSUES

Ohm raises two issues on appeal, which we restate as the following three issues:

(1) Whether the trial court provided a sufficient sentencing statement;

(2) Whether the trial court abused its discretion in its finding and weighing of aggravating and mitigating circumstances; and

(3) Whether Ohm's sentence is invalid under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), *reh'g denied*.

FACTS AND PROCEDURAL HISTORY

On or about October 19, 1988, Lewis McKay (McKay) and John Ross, who were both over sixty-five, were found dead with their throats slashed in McKay's home. On April 4, 1989, the State filed an Information charging Ohm and Bryan Brown (Brown) with the murders and several other crimes. In addition, the State filed an Information declaring its intent to seek the death penalty against Ohm. On August 31, 1989, Ohm and the State entered into a plea agreement by which Ohm would plead guilty to the two murders and testify against Brown. In exchange, the State would dismiss its request for the death penalty and the twelve other felony charges against Ohm, which were: two counts of burglary resulting in serious bodily injury, a Class A felony, I.C. § 35-43-2-1; two counts of robbery

resulting in serious bodily injury, a Class A felony, I.C. § 35-42-5-1; two counts of robbery while armed with a deadly weapon, a Class B felony, I.C. § 35-42-5-1; two counts of confinement resulting in serious bodily injury, a Class B felony, I.C. § 35-42-5-1; two counts of confinement while armed with a deadly weapon, a Class B felony, I.C. § 35-42-5-1; and two counts of theft, a Class D felony, I.C. § 35-42-4-2. The parties also agreed that Ohm's sentences for the two murders would run concurrently.

On July 20, 1990, after the completion of Brown's trial, the trial court held a sentencing hearing in Ohm's case. Ohm presented several witnesses who suggested that Brown had great influence over Ohm and had instigated the murders and that it was unlikely that Ohm would commit similar crimes in the future. Ohm himself testified that he was drawn to Brown because he "saw him as an answer to a lot of weaknesses and problems that I have in my character." (Sentencing Transcript p. 10). However, he added, "I don't think Judge Melichar can overlook the disgustedness and the severity of the crime, no matter how hard I want to go back and change it, I can't, and because of that I feel that any amount of punishment that he decides upon today is justifiably deserved." (Sent. Tr. p. 12). In his closing argument, Ohm's attorney stated, "[T]here's nobody can [sic] downplay the nature of the offenses here. It's---it's as horrible a crime as I've been involved with---with maybe one or two exceptions[.]" (Sent. Tr. p. 66).

The State did not call any witnesses but did present an argument. It first acknowledged that "Brown was definitely the motivator in these murders, it was his idea, he pushed them and in that the result may lead and very likely should lead to some disparity in

sentencing." (Sent. Tr. p. 71). The State also recognized that Ohm deserved credit for cooperating with the State but argued that Ohm had gotten that credit when the State agreed to drop its request for the death penalty and to recommend concurrent sentences. Furthermore, the State contended that any mitigating circumstances were outweighed by the seriousness of the crimes.

In sentencing Ohm, the trial court made the following relevant remarks:

> My perception, and I've had the benefit of hearing the evidence during the trial [of Brown] and when it was over my perception was that your sentencing would be more difficult than Mr. Brown's. He, more clearly, fits the criminal profile, with which I'm quite familiar.
>
> * * *
>
> This crime or these crimes are probably the most heinous I've seen, outside of the one earlier this year. These people were---these victims were beaten, literally, to a pulp and then brutally murdered, just d[e]spicable. I've looked at the standards, of course, that we use in determining what sentence is appropriate. The---the key here, I think, because you have some possibility, I use that word possibility of rehabilitation. And, of course, I also think that during the course of this [Brown's] trial and afterward you've been telling the truth. Hopefully, my experience over all these years has given me some perception of who tells the truth and who doesn't. I've been involved in a few trials and a long practice and I think also your remorse is genuine. But, the crime---the crimes themselves light up all the aggravating factors. I mean we've got people over sixty-five, defenseless victims, in the sanctity of their own home, being savaged by---by uncivilized conduct of the most reprehensible sort.
>
> * * *
>
> Now, the thing I keep coming back to, as I've indicated, was this, whether, if you're released, you would once again fall under the spell of some other

> [R]asputin.[1] That's the key question. That's the key question, that's what has to be answered, positively, absolutely, no, in my view. Because if you do, then as sure as night follows day, there's---there's going to be another, in my view at least, another homicide or more. Now, I don't have the luxury of some people, of sitting back and saying, well this may happen or that may happen, well this good's gonna take place and all this, because if my judgment is mistaken then more blood will be spilled and I've got a responsibility to society, broader than just looking at numbers and making some speculations. I want to see you rehabilitated, I want to see you make something of your life, I want to see you a credit to your community and to a possible family, I want all these things. However, I must absolutely be convinced in my own mind that, as I say, you will not fall under the spell of some future [R]asputin who will lead you to another event of this horrible magnitude. And I'm not convinced that this will take place, I'm not convinced.

(Sent. Tr. pp. 77-80). The trial court then mentioned, again, that Ohm had exhibited genuine remorse, but it also noted that Ohm had admitted that "prior to the murders there had been a string of burglaries and criminal conduct." (Sent. Tr. p. 82). Finally, addressing the statutory mitigator that the person is unlikely to commit another crime, the trial court stated, "I'm unsure about that." (Sent. Tr. p. 82). The trial court imposed the maximum sentence of sixty years[2] for each murder and ordered that the sentences be run concurrently, in accordance with the plea agreement.

Ohm now brings this belated appeal. Additional facts will be provided as necessary.

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[1] Grigory Rasputin was a Russian peasant who gained a reputation as a holy man able to heal the sick and who enjoyed significant influence in the Russian government in the early 1900s. *See* Encyclopædia Britannica Online, http://www.britannica.com/ebc/article-9376502 (last visited April 18, 2008).

[2] The murder sentencing statute in effect at the time of Ohm's offenses provided for a minimum sentence of thirty years, a presumptive sentence of forty years, and maximum sentence of sixty years. See I.C. § 35-50-2-3 (1988) ("A person who commits murder shall be imprisoned for a fixed term of forty (40) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances[.]").

DISCUSSION AND DECISION

I. *Standard of Review*

Ohm committed his offenses in 1988 and was therefore sentenced under Indiana's former presumptive sentencing scheme.[3] Under that scheme, if a trial court relies upon aggravating or mitigating circumstances to enhance or reduce the presumptive sentence, it must (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *Henderson v. State*, 769 N.E.2d 172, 179 (Ind. 2002). "We review trial court sentencing decisions only for abuse of discretion, including a trial court's decisions to increase or decrease the presumptive sentence because of aggravating or mitigating circumstances[.]" *Id*.

II. *Sufficiency of the Sentencing Statement*

Throughout his brief, Ohm repeatedly suggests that the trial court failed to sufficiently articulate its evaluation and balancing of the aggravating and mitigating circumstances. We disagree. The trial court identified several mitigating factors: Brown, not Ohm, was the primary actor; there was some possibility that Ohm could be rehabilitated; Ohm told the truth during Brown's trial and afterward; and Ohm showed genuine remorse. Nonetheless, the trial court found, "But, the crime---the crimes themselves light up all the aggravating factors." (Sent. Tr. p. 79). The court then listed the aggravating factors: the age of the victims, the fact that the crimes were committed in one of the victims' homes, and the

[3] Indiana's new advisory sentencing scheme took effect on April 25, 2005. *See* P.L. 71-2005.

heinous nature of the crimes. It was this last aggravator that clearly tipped the scales for the trial court. It stated that the victims were "savaged by---by uncivilized conduct of the most reprehensible sort." (Sent. Tr. p. 79). While we address the propriety of the trial court's findings in the next section of our opinion, we can at least say that the trial court sufficiently explained its reasons—good or bad—for imposing the sentence that it did.

III. *Aggravators and Mitigators*

Ohm contends that the trial court abused its discretion in its finding and weighing of certain aggravating and mitigating circumstances. As with all sentencing decisions, the finding and weighing of aggravating and mitigating circumstances is within the discretion of the trial court. *See Matshazi v. State*, 804 N.E.2d 1232, 1238 (Ind. Ct. App. 2004), *trans. denied*.

A. *Aggravating Circumstances*

As noted above, the trial court found three aggravating circumstances: the age of the victims, the fact that the crimes were committed in one of the victims' homes, and the heinous nature of the crimes.[4] Ohm does not challenge the trial court's reliance upon the age of the victims or the heinous nature of the crimes. However, he maintains that the trial court

[4] In its written sentencing order, the trial court noted: "Evidence in mitigation is heard and the State introduces no evidence in aggravation." (Appellant's App. p. 174). At certain points in his brief, Ohm seems to suggest that this means that the trial court did not find any aggravating circumstances. As the trial court's oral sentencing statement makes clear, this is not the case.

abused its discretion in relying on the fact that the crimes took place in McKay's home as an aggravating circumstance. He is correct.

In *Farmer v. State*, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002), we held that where the State dismisses a burglary charge pursuant to a plea agreement, the trial court cannot rely upon the fact that the crime took place in the victim's home as an aggravating circumstance for purposes of sentencing on the crime or crimes to which the defendant pled guilty. Here, the State agreed to dismiss, among other things, two counts of burglary in exchange for Ohm's guilty plea on the murder charges. Therefore, the trial court abused its discretion by relying on the fact that the crimes took place in one of the victims' homes as an aggravating circumstance.

Ohm also suggests that the trial court abused its discretion in finding an additional aggravating circumstance: the likelihood that Ohm would re-offend. It is true that the trial court spoke at length about Ohm's chances of being rehabilitated and the *possibility* that he would commit similar crimes in the future. However, the trial court never affirmatively stated that it believed that Ohm would commit similar crimes. To the contrary, in addressing the statutory mitigator that the person is unlikely to commit another crime, the trial court stated, "I'm unsure about that." (Sent. Tr. p. 82). It appears, then, that the trial court was *rejecting* a mitigator rather than *finding* an aggravator. In any event, the trial court's uncertainty with regard to Ohm's future dangerousness is justified by the brutality of the murders and the ease with which Ohm succumbed to Brown's influence.

B. *Mitigating Circumstances*

In addition to the aggravating factors, the trial court also identified several mitigating factors: Brown, not Ohm, was the primary actor; there was some possibility that Ohm could be rehabilitated; Ohm told the truth during Brown's trial and afterward; and Ohm showed genuine remorse. Ohm asserts that the trial court abused its discretion in failing to give some of those factors adequate mitigating weight and in failing to find certain other mitigating circumstances.

Ohm first argues that the trial court abused its discretion in failing to find his lack of a prior criminal record as a mitigating circumstance. However, the mitigating weight of that fact is minimized, as the trial court recognized, by the fact that Ohm admitted that, prior to the murders, he had been involved in "a string of burglaries and criminal conduct." (Sent. Tr. p. 82). In other words, while it is true that Ohm did not have a formal criminal record at the time of the murders, the murders did not represent his first foray into criminal activity. As such, the trial court did not abuse its discretion in assigning Ohm's lack of a criminal record little or no mitigating weight.

Ohm also asserts that the trial court abused its discretion in failing to identify as a mitigating circumstance the fact that Ohm was not the "primary actor" in this case. (Amended Appellant's Br. p. 10). We disagree. First, the State conceded that "Brown was definitely the motivator in these murders, it was his idea, he pushed them and in that the result may lead and very likely should lead to some disparity in sentencing." (Sent. Tr. p. 71). In turn, the trial court demonstrated a good understanding of the relationship between

Ohm and Brown when it noted that Ohm had fallen under the spell of a Rasputin and that Brown more clearly fits the "criminal profile." (Sent. Tr. pp. 77-78). The trial court did not abuse its discretion with regard to this mitigating circumstance.

Next, Ohm urges that the trial court abused its discretion by failing to identify his guilty plea as a significant mitigating circumstance. Again, we disagree. A guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit in exchange for the plea. *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied*. Here, Ohm benefited greatly from his guilty plea. The State dismissed its request for the death penalty, dismissed twelve other felony counts, and agreed that Ohm's sentences for the murders would run concurrently. In light of these benefits, the trial court did not abuse its discretion in assigning Ohm's guilty plea little or no mitigating weight.

In addition, Ohm argues that the trial court abused its discretion by giving inadequate mitigating weight to his remorse. Yet again, we disagree. As Ohm notes, the trial court twice mentioned the genuineness of his remorse in its sentencing statement. This seems to us to be an indication that Ohm's remorse was a weighty consideration in the trial court's sentencing decision. And to the extent that the trial court did not assign Ohm's remorse even *greater* weight, a trial court's evaluation of a defendant's remorse is similar to a determination of credibility, which we generally will not disturb. *Pickens v. State*, 767 N.E.2d. 530, 535 (Ind. 2002).

C. *Balancing of Aggravators and Mitigators*

In sum, we conclude that the trial court properly found and weighed all of the mitigating circumstances as well as all of the aggravating circumstances but one: the fact that the crimes took place in one of the victims' homes. Even when a trial court abuses its discretion in its finding of aggravating and mitigating circumstances, we will affirm the sentence when we can say with confidence that the trial court would have imposed the same sentence if it had considered the proper factors. *See id.*; *Comer v. State*, 839 N.E.2d 721, 725 (Ind.Ct.App.2005), *trans. denied*.

Here, the overwhelming factor was the brutal nature of the crimes. Ohm first noted this factor in his own testimony, stating, "I don't think Judge Melichar can overlook the disgustedness and the severity of the crime, no matter how hard I want to go back and change it, I can't, and because of that I feel that any amount of punishment that he decides upon today is justifiably deserved." (Sent. Tr. p. 12). Ohm's attorney, in his closing argument, added, "[T]here's nobody can [sic] downplay the nature of the offenses here. It's---it's as horrible a crime as I've been involved with---with maybe one or two exceptions[.]" (Sent. Tr. p. 66). The trial court agreed, describing the crimes as some of the most heinous it had seen. It noted that the victims were beaten "to a pulp" and "brutally murdered" and characterized the crimes as "just d[e]spicable." (Sent. Tr. p. 78). It stated that the victims, both over sixty-five, were "savaged . . . by uncivilized conduct of the most reprehensible sort." (Sent. Tr. p. 79). In light of such comments, we are confident that the trial court would have imposed the same sentence even if it had not considered the improper aggravator.

IV. *Blakely*

Ohm also asserts that his sentence is invalid under *Blakely*, 542 U.S. at 301, where the United States Supreme Court reiterated the rule, first announced in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." However, Ohm was sentenced on July 20, 1990, nearly fourteen years before *Blakely* was decided. The Indiana Supreme Court has held that belated appeals of sentences entered before *Blakely* are not subject to its holding. *Gutermuth v. State*, 868 N.E.2d 427, 428 (Ind. 2007). As such, Ohm is not entitled to have his sentence reviewed under *Blakely*.

CONCLUSION

Based on the foregoing, we conclude that the trial court entered a sufficient sentencing statement; that, while the trial court abused its discretion with regard to one of the aggravating circumstances, we can say with confidence that the trial court would have imposed the same sentence even if it had considered only the proper factors; and that Ohm is not entitled to have his sentence reviewed under *Blakely*.

Affirmed.

KIRSCH, J., and FRIEDLANDER, J., concur.